Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

DOUGHBOY RECREATIONAL DIVISION OF HOFFINGER INC., HOFFINGER INDUSTRIES,
Petitioners,

v.

KENNY COYLE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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15 pp

QUESTIONS PRESENTED

1. Does the Supremacy Clause of the United States Constitution, through the doctrine of preemption, prevent states from imposing, through common law tort liability, duties on (i) product manufacturers when the Consumer Product Safety Commission has issued findings covering the same risk of injury as is implicated in the state court action when the Commission specifically rejected a warning of the type advocated in the state court action and (ii) manufacturers other than that of the product in question?

2. Does the Constitutionally protected right to due process ensure the right: (i) to consistent application of the rule of law on issues such as defect, duty and proximate cause; and, (ii) to a fair adversarial trial free from the effects of secret, collusive agreements between co-defendants and the plaintiff?

CORPORATE DISCLOSURE STATEMENT

Hoffinger Industries is the parent corporation relevant to these defendants. There are no publicly held corporations with over 10% ownership in the company.

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OFFICIAL AND UNOFFICIAL FINDINGS/OPINIONS FROM UPON WHICH PETITION IS BASED:

1. Journal Entry of Judgment Upon Verdict: In the District Court for Pittsburg County, State of Oklahoma.....8/31/2000;

2. Opinion Affirming Trial Court: Oklahoma Court of Civil Appeals.....2/12/2002;

3. Denial of Motion for Reconsideration: Oklahoma Court of Civil Appeals.....4/26/2002;

4. Denial of Petition for Certiorari.....7/02/2002.

JURISDICTIONAL STATEMENT

Judgment was entered on August 31, 2000 and petitioner's appeal denied on February 12, 2002;

Rehearing was denied in the Oklahoma Court of Civil Appeals on April 30, 2002. Petitioner's Petition for Writ of Certiorari to the Oklahoma Supreme Court was denied on July 2, 2002;

Jurisdiction is conferred on this Court though 28 U.S.C. §1257(a) which states as follows: Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

1) United States Constitution, Article VI, Clause II:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

2) United States Constitution, 14th Amendment, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2) 16 C.F.R. § 1207 (1976).
-content set out in appendix

3) 41 Fed. Reg. 2742-46
-content set out in appendix

4) 15 U.S.C. 2051

(a) The Congress finds that - (1) an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce; (2) complexities of

consumer products and the diverse nature and abilities of consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately; (3) the public should be protected against unreasonable risks of injury associated with consumer products; (4) control by State and local governments of unreasonable risks of injury associated with consumer products is inadequate and may be burdensome to manufacturers; (5) existing Federal authority to protect consumers from exposure to consumer products presenting unreasonable risks of injury is inadequate; and (6) regulation of consumer products the distribution or use of which affects interstate or foreign commerce is necessary to carry out this chapter. (b) The purposes of this chapter are - (1) to protect the public against unreasonable risks of injury associated with consumer products; (2) to assist consumers in evaluating the comparative safety of consumer products; (3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

STATEMENT OF THE CASE

A. *Factual Summary*

Kenneth Coyle ("Coyle"), who was 21 years of age at the time of this incident, was injured at a late night party when he slid down a slide head first into a shallow, above-ground pool of known depth. Coyle filed suit against the distribution companies who allegedly sold the pool and/or the slide as well as the pool manufacturer. ("Petitioner"). It is undisputed that Petitioner neither manufactured or distributed the slide in question.[1]

On Friday August 27, 1994, Coyle, who lived in Atoka, drove with a friend to Durant, Oklahoma at around 8:00 P.M. (Tr.Vol.I at 21). They drove back to Atoka around 11:00 P.M. and drove to the home of Royce Blaker. Mr. and Mrs. Blaker were out of town and the daughters were having a party. (Tr.Vol.I at 22). There were about 15 people at the party when Coyle arrived; everyone had been drinking and most were standing in the Blakers' above ground pool drinking beer.

After about 30 minutes, during which time Coyle admittedly drank two 12 ounce beers, two friends threw him in the pool. (Transcript of Kenny Coyle deposition, October 19, 1996 at 37-39). When he stood up in the pool, Coyle noticed that the water was around the level of his belly button and became about 2-3 inches shallower as he walked towards the edge of the pool. (Tr.Vol.I at 27). Coyle drank a third beer once he climbed out of the pool. (Transcript of Kenny Coyle Deposition, October 19, 1996 at 42). He admits that after this third beer he was probably impaired. (Transcript of Kenny

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[1] The slide manufacturer was never included as a party by Coyle and the homeowners settled before suit was filed. (Tr.Vol.III at 607; Tr.Vol.I at 203).

Coyle deposition, October 19, 1996 at 155).[2]

Coyle knew from being in the pool that it had a hard bottom and that, at its deepest point, the water level in the pool reached only up to his belly button. (Tr.Vol. I at 27, 37). Coyle knew that above ground pools were not for diving, because there was a danger of hitting one's head on the hard pool bottom. (Tr.Vol.I at 36). He also knew, without the benefit of a warning sign, that he should not dive into water - whether on his own or off a slide - in less than eight feet of water. (Tr.Vol.I at 37-39).

At some point, Coyle decided to use the water slide which the Blakers had separately purchased for the pool (Tr.Vol. I at 26; Transcript of Royce Blaker deposition, July 18, 1996 at 31-32).[3] The first time he used the slide, Coyle slid head first with his hands out in front of him. (Tr.Vol.I at 26). He recalled skipping across the top of the water and then going underwater. His hands, still out in front of him, hit the hard, sandy bottom of the pool. (Tr.Vol.I at 28-29). From this first slide, Coyle knew it was possible that, given the depth of the pool, the first part of his body entering the water could hit the bottom of the pool. (Tr.Vol.I at 46).

This second time Coyle decided to slide down head first with his hands by his side - leading with his head; he had no explanation for why he decided to slide this way. (Tr.Vol.I at

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[2] All evidence regarding alcohol use at the party was made at trial by way of proffer, as the Court excluded all such evidence pre-trial, a decision which is not a subject of review for this Court but which is an important factor in Petitioner's Due Process argument. (Transcript of Proceedings, March 31, 2000 at 5-24).

[3] It is undisputed the slide in question was purchased separately and erected in the homeowner's back yard some years after the pool was originally purchased and placed in the back yard. The homeowner had also erected a deck around the pool after it was purchased and never used the warnings stickers or sign that came with the pool. (Deposition of Royce Blaker, July 18, 1996 at 31-34, 68).

30-31). When he hit the water, Coyle went straight down into the water and hit his head on the same sandy, hard bottom that he hit with his hands minutes earlier. (Tr.Vol.I at 31). Coyle admitted that he could not tell the jury the difference between a dive into shallow water and what Coyle did on the night of his injury. (Tr.Vol.I at 49).

The Consumer Products Safety Commission ("CPSC") promulgated requirements applicable to slide manufacturers. In considering and implementing regulations, the CPSC required slide manufacturers place warning stickers on their slides illustrating the correct and incorrect ways to use this slide. (Tr.Vol.II at 284-285; 290-293). The CPSC also mandated the use of an additional sticker when a slide is placed in less than four feet of water; that sticker was not on the Blaker slide. (Tr.Vol.II at 293-294). It is undisputed that no similar labeling duty was ever imposed by any federal or state agency on pool manufacturers. (Tr.Vol.II at 295). Moreover, the commentary to the CSPC regulations makes clear the CPSC considered and rejected suggestions that regulations prohibit the use of a slide with an above ground pool or with a pool of certain depth. 41 Fed.Reg. 2743-44. Pre-trial, Petitioner moved for summary judgment orally on the grounds that the claims against Petitioner were preempted by the CPSC regulations. (Trancript of Proceedings, May 31, 2000, pp. 53-57). That motion was denied by the trial court at that time. (Trancript of Proceedings, May 31, 2000, p. 67).

Regardless, some of the originally federally required warning stickers were on the slide on the night in question. These stickers - which were placed at eye level on the ladder - indicated that a head first belly slide was not a proper way to use the slide. However, Coyle did not see those warnings, because the Blakers' backyard was not lit well enough for Coyle to see those warnings and because he admittedly was not looking for warnings as he was climbing the slide. (Tr.Vol.I at 44). However, he testified that he would not have slid as he did

if he had seen the warning stickers. (Tr.Vol.I at 47).

This case originally included three defendants - Petitioner; Ward Pools and Spas, Inc, the pool distributor; and South Central, the slide distributor. Prior to trial, and kept secret until counsel for Petitioner raised the issue on the first morning of trial, the other two defendants reached a settlement agreement with Coyle in the form of a high/low agreement. (Transcript of Proceedings, May 31, 2000 at 32-39, 58, Tr.Vol.II at 346). Upon learning of that agreement, Petitioner moved for severance prior to trial, so that the allegations against Petitioner could be tried separately from the defendants who already had an agreement in place with Coyle. The trial court denied that motion. (Transcript of Proceedings, May 31, 2000 at 48-49). Petitioner's request for a mistrial made during trial were similarly denied. (Tr.Vol.I at 204-208).

During the trial, the following events transpired: no jury charges or motions in limine were filed by the other defendants (Transcript of Proceedings, May 31, 2000 at 32-33); the other defendants supported Coyle's motions in limine to exclude evidence of Coyle's alcohol use and evidence of the general atmosphere at the party (Transcript of Proceedings, May 31, 2000 at 15-20, 62-63); the pool distributor's representative, Kelly Ward, expressed his belief that the pool was defective, which the trial court noted was essentially an admission of liability (Tr.Vol.I at 195, 208); Coyle's "cross-examination" of Ward did not elicit any of the damaging testimony that was uncovered against Ward during his deposition but focused solely on information Ward was given by Petitioner (Tr.Vol.I at 183-196, 204); Ward's attorney declared Petitioner's trial witness a hostile witness and aggressively attempted to force him to admit that the pool warning was defective, even though his client's liability was strictly derivative of Petitioner's (Tr.Vol.I 142-154); those defendants' attorneys asked no questions of Coyle on cross-examination (Tr.Vol.I at 49-50, 62); Coyle did not elicit any testimony from its expert critical

of South Central and attempted to prevent Petitioner from doing so, even though that expert's testimony was the only evidence critical of South Central, a named defendant. (Tr.Vol.I at 237-280; Tr.Vol.II at 281-283).

Then, after Coyle completed the liability phase of his case, it was announced that Coyle had reached a final settlement agreement with the other defendants. (Tr.Vol.II at 331-334). Petitioner moved for a mistrial or/in the alternative, moved for the trial court to advise the jury of the high/low agreement and to be allowed to examine witnesses regarding that agreement. All these requests for relief were denied. (Tr.Vol.II at 334-337, 342-359). During the court's ruling on this motion, it commented on its displeasure of Petitioner's mediation position and noted that the only evidence against Ward was his admission that he sold a defective product, and the only evidence against South Central was that elicited from Coyle's expert by Petitioner. (Tr.Vol.II at 352-356).

B. *Procedural History*

Petitioner filed for summary judgment on the issues of defect and open and obvious danger and the trial court denied that motion on March 29, 2000. That motion was renewed pre-trial. At that time, Petitioner moved for summary judgment orally on the grounds that the claims against Petitioner were preempted by the CPSC regulations. (Transcript of Proceedings, May 31, 2000, pp. 53-57). Both the renewed motion and the new preemption motion were denied by the trial court at that time. (Trancript of Proceedings, May 31, 2000, p. 67). Also pre-trial, Petitioner inquired into the secret settlement agreement, requesting, among other relief, a motion for severance and specifically raising concerns about the fairness and sanctity of the proceedings in light of the lack of adversarial relationship between Coyle and the other trial defendants. (Id. at 32-49). That motion was denied by the trial court at that time. (Id. at 48-49).

The motion for a mistrial based on the collusion

between Coyle and the other trial defendants was renewed during trial once the settlement with those defendants was announced. (Tr. Vol. II, pp.332-359). The trial court also refused all requests that the jury be informed of the agreement and refused to allow witnesses to be cross-examined on its existence. Id. After the close of Coyle's case-in-chief, Petitioner renewed its motions as to the existence of defect, causation and preemption. (Tr. Vol. III, p. 586, 589-590). The trial court denied those motions. (Tr. Vol. III, p. 588). All grounds were again renewed at the close of evidence and denied once again by the trial court. (Tr. Vol. III, pp.675-677).

Coyle was awarded $2 million by the jury and a judgment was entered on Coyle's behalf on August 31, 2000. Petitioner timely filed its petition in error pursuant of Oklahoma procedure on September 29, 2000 and filed its initial appeal brief on May 24, 2001, renewing all previously stated motions based on preemption, defect, proximate cause, and denial of fair trial based on the collusion. The Oklahoma Court of Civil Appeals denied Petitioner's appeal by a 2-1 vote on February 12, 2002; Petitioner's motion for reconsideration was denied by that same Court on April 30, 2002. Petitioner then filed a petition for certiorari with the Oklahoma Supreme Court, which was denied by a vote of 5-4 on July 2, 2002. This appeal follows, 90 days following the denial of the petition for certiorari to the Oklahoma State Supreme Court.

ARGUMENT AND CITATION OF AUTHORITY

A. *The State Courts Below Erred in not Finding Coyle's Claims Barred by the Doctrine of Preemption.*

A fundamental principle of the Constitution is that Congress has the power to preempt state law. Preemption is most easily identified where Congress has included within a law an express provision governing preemption. Preemption will also be implied in two circumstances: 1) where Congress

has adopted such a comprehensive regulatory scheme as to have essentially removed the field from the state realm; and 3) where state law directly conflicts with federal law or interferes with the achievement of federal objectives. See English v. General Elec. Co., 496 U.S. 72, 78-79 (1990). An implied conflict can take two forms - it may occur when it is "impossible for a private party to comply with both state and federal requirements, . . . or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Association of Int'l Automobile Mfrs., Inc. v. Abrams, 84 F.3d 602, 607 (2nd Cir. 1996); *see also* Hines v Davidowitz, 312 U.S. 52, 66-67 (1941); Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).

Under the Consumer Product Safety Act (CPSA), the Consumer Product Safety Commission (CPSC) adopted a standard entitled "Safety Standard for Swimming Pool Slides," which was "intended to reduce the unreasonable risk of injury associated with swimming pool slides . . . by warnings to be attached to the slide showing proper techniques for use of the slide and to be provided to the user-installer, and by recommending minimum water depths depending on the height of the slide and the age of the user."[4] *See* 16 C.F.R. § 1207 (1976).The fact that one of the stated purposes of the standard was to recommend *pool water depths* and the that the CPSC considered and rejected a suggestion that slides should not be placed with pools of certain depths illustrates that the CPSC clearly foresaw that this standard would impact both the pool and slide industries. Therefore, preemption analysis is a proper issue to address in a case involving an injury caused by the use of a slide with an above-ground pool. See 41 Fed. Reg. 2744-2745. Despite this specific consideration and rejection of such a prohibition, in the case at bar, Coyle's argument to the jury

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[4] See Safety Standard for Swimming Pool Slides, 41 Fed. Reg. 2743.

was that Hoffinger's warnings were defective for *not* employing just such a prohibition.

These standards dictated how swimming pool slides are to be designed, manufactured, and installed, and mandated that certain warnings be put on slides. The Commission clearly contemplated proposed regulations that slides would be put with above and below ground pools; §1207.1(a)(2) makes the standard applicable to slides used with "all swimming pools, whether in-ground, on-ground, or above-ground." Specifically with regard to warnings, §1207.7 when enacted mandated for manufacturers of slides the use of certain warning stickers on all slides, and mandated the use of additional warnings on slides placed in 4 feet or less of water. [5] These regulations continue to provide guidance with respect to the dangers associated with the misuse of swimming pool slides; the CPSC has never enacted any regulation mandating a prohibition against use of slides with above ground pools.

Under the CSPC standards, the **entire** burden for warning slide users of the dangers attendant to that use - whether the slide was connected to an above-ground or below-ground pool - was placed on the slide manufacturers, who were to include intended use instructions with the slide and were to permanently attach the mandated labels and warnings on the slide at the time of manufacture. 16 C.F.R. §1207.7 (1976). In explaining the process the Commission undertook to arrive at the standards it eventually adopted, which included the consideration of written comments from interested parties, the Commission made clear that it had **considered and rejected** a proposal to mandate the placement of other warning signs

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[5] The CPSC's decision to place the burden warning on slide manufacturers is consistent with widely embraced case principles that one is not required to warn of dangers associated with products manufactured by another. See, e.g., Spencer v. Ford Motor Co., 141 Mich.App. 356, 367 Nw2d 393 (1985).

around the pool area in addition to those to be placed on the side itself. The CPSC determined the presence of additional signage could dilute the effectiveness of the regulations' requisite warnings -- on the slide itself:

> Another comment suggests that the instructions for the intended use of slides should be prominently displayed in the slide or pool area . . .The Commission has required the permanent attachment on the slides of signs conveying the information deemed to be most important in preventing injuries occurring in the use of the slides. The considerable information contained in the intended-use instructions that is not presently required to be attached to the slide would have to be provided on a separate sign to be displayed elsewhere, according to this suggestion. **This separate sign could tend to dilute or reduce the effectiveness of the signs on the slides.** Accordingly, the suggestion has not been adopted.

41 Fed. Reg. 2746. In the case sub judice, the question, therefore, is whether, in light of the CPSC's rejection of a regulatory scheme -- as Coyle advocated at trial -- prohibiting use of slides with above ground pools, Coyle can recover damages in state court against a pool manufacturer for failing to warn of the dangers of using a later-added slide (manufactured by a totally separate corporation) with the Petitioner-manufactured above ground pool.[6]

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[6] In the case sub judice, Thomas Masterson, president of S.R. Smith, the slide manufacturer impleaded below as a third party defendant, acknowledged the regulatory scheme as enacted by the CPSC in 1976 and applied to slide manufacturers. (Tr. Vol. III; p.606). Plaintiff's expert, Samuel Glucksberg, in reference to the CPSC standards concerning slide warnings and use, testified these regulations apply to and set the legal requirements in the area for slide manufacturers. (Tr. Vol. II; p.290-91;

This Court has repeatedly held that common law and statutory tort actions are subject to the same preemption analysis as are state laws or regulations because "it is well established that a state regulation can be as effectively exerted through an award of damages as through some form of preventative relief." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521; Carstensen v Brunswick Corp., 49 F.3d 430, 432 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 182 (1995). In fact, this Court found the claims brought by the petitioner in Geier v. American Honda Motor Co., Inc., 529 U.S. 861 (2000) to be impliedly preempted, even though those claims were brought through a lawsuit as opposed to a state law or regulation. This Court has never had the opportunity to address these precise issues in the context of a claim involving the CPSA. Several Federal Circuit Courts and lower State Courts have split on the issue of whether the CPSA expressly preempts common law tort claims that would have the effect of creating a state standard.[7]

Even if the common law claims are not expressly preempted, however, the question remains whether all such claims must be analyzed under ordinary *implied* preemption principles. This Court has held generally that all common law

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295) In Aqua Slide N' Dive Corporation v. The Consumer Product Safety Commission, 569 F.2d 831 (5th Cir. 1978), the court set aside certain standards of the CSPC as to warnings and slide use. Id. At 844. The court took no issue with the CPSC's findings as to concerns about dilution of warnings and left undisturbed the CPSC's rejection of regulations prohibiting use of slides with above ground pools. The findings of the CPSC remain in the regulations; replacement standards in the specified areas have yet to be promulgated to date.

[7] Carlson v BIC Corp., 89 F.3d 832 (6th Cir.1996) (Unpublished table opinion); Moe v. MTD Products, 73 F.3d 179 (8th Cir.1995); Frazier v Hendringers & MTD Prods., Inc., 96 F. Supp.2d 486 (E.D.Pa.2000); Cortez v. MTD Prods., Inc., 927 F.Supp. 386 (N.D.Ca.1996)

tort claims are subject to such analysis but has never specifically analyzed the CPSA to determine if some reason exists why it should be exempt from such analysis. *See* Id. at 869. It is relevant for this Court to consider that the claim upon which liability was based in the case at bar was strict liability as opposed to mere common law tort.

The Ninth Circuit Court of Appeals, has used this Court's ruling in Geier to hold that no common law tort claim implicating the CPSA can ever be expressly or impliedly preempted. Leipart v Guardian, 234 F. 3d 1063 (9th Cir. 2000). With regard to express preemption, the Ninth Circuit stated that this Court in Geier "concluded that, under the NTMVSA, a preempted state law "standard" was not the same thing as a state common-law tort "requirement." Id. at 1069-1070. In truth, however, this Court declined to engage in such an analysis, stating that it "need not determine the precise significance of the use of the word 'standard,' rather than 'requirement,'" because of the wording of the saving clause in the statute. Geier 529 U.S. at 867-868.

More importantly, the Ninth Circuit, relying on Geier, effectively held that under the CPSA, no common law tort claim can ever be impliedly preempted. In so holding, the Ninth Circuit used this Court's supposed ruling in Geier that "standards" do not include "requirements" imposed pursuant to a state common law tort claim. As such, and since the CPSA was designed "to develop uniform safety *standards* and to minimize conflicting State and local *regulations*," a tort based *requirement* can never, in the eyes of the Ninth Circuit, interfere with the goal of setting uniform standards. Leipart, 234 F. 3d at 1070-1071. Preemption under the CPSA, in the Ninth Circuit's view, is impossible.

The Ninth Circuit's ruling misstates this Court's holding in Geier - which, after all, rested its decision on implied preemption of a common law state tort claim - and creates a significant split between it and this Court, as well as

with other circuits. Further review of the case sub judice would allow the Court an opportunity to clarify its holding in Geier, to correct the misapplication of that holding by the Ninth Circuit, and to decide an issue which is of great importance to all product makers in this county - whether under the CPSA a common law or statutory tort claim is subject to preemption analysis?

Petitioner contends there is no support whatsoever in the CPSA for a finding that common law tort claims should be excluded from implied preemption analysis and further contends that the lower courts in the case before the Court erred in not finding the claims against petitioner barred under such implied preemption analysis in this case. In the case sub judice, Coyle's entire argument against Petitioner was that its warnings were defective in failing to warn consumers or retailers not to put slides with above ground pools. The CPSC considered and specifically rejected just such a ban on the placement of slides with pools of a certain depth, finding that such a ban could actually increase the hazard of drowning to small children.[8] The CPSC also determined additional signage — as advocated by Coyle's expert below — would only serve to weaken the impact of the warnings on the slide itself. For a state court to impose liability on a pool manufacturer in direct contravention of the CSPC is to destroy the very protections the CPSC was attempting to afford *product users*. Inconsistent requirements imposed by state tort law would pose a significant obstacle to both a specific CPSC objective - warning slide users of the correct way to slide into shallow water, as described in the

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[8] This Court has, in other contexts, held that the informed decision of a federal agency charged with regulation of certain products or activities to forgo regulation in a given area "may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate." Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n., 461 U.S. 375, 384 (1983)

specific regulation - and of the general stated purposes of the CPSC - "to develop uniform safety standards for consumer products and *to minimize conflicting State and local regulations*." 15 USC 2051(b)(3)(emphasis added).

The danger presented to consumers and the uncertainty created for pool manufacturers presented by Coyle's position is obvious. While the federal government has informed the industries that additional warning signs might actually endanger consumers by confusing them, state courts may impose liability on the *pool* industry if it fails to provide those additional warnings *about slides*. Facing possible tort action, the industry will then begin including additional warnings with its pools and, risking reduced effectiveness of the federally mandated and prescribed warnings, possibly endanger consumers and users. This very circumstance was foreseen and addressed by the CPSC when the suggestion for additional signage was discarded. In the absence of this Court's enforcement of preemption, the pool and slide industries will be faced with lawsuits whether they complied with or ignored the CPSC's reasoning. The result would not be the uniform safety standards envisioned by the Congress when it created the CPSC, but the hodgepodge of standards from state to state which the CPSA and preemption were formulated to avoid.

As illustrated above, Coyle's theory against Petitioner clearly conflicts with the CPSC's regulations and its decision, and the reasoning behind that decision, to impose upon slide manufacturers exclusively the duty to warn consumers of the dangers of slide usage. As such, claims such as those of Coyle are preempted as a matter of law. Granting this petition would not only allow the Court to correct the misapplication of the preemption doctrine in this specific case but would also allow this Court to clarify the scope of that doctrine and the application of implied preemption analysis to claims implicating the CPSC. Accordingly, this Court should grant this petition and afford the parties an audience on these issues.

B. *The State Courts Below Violated Petitioner's Federally Protected Due Process Rights When They Allowed Trial to Proceed But Prohibited Petitioner From Introducing Evidence of The Bias and Prejudice of the Co-Defendants Due to the Pre-Trial Settlement Between Coyle and the Other Trial Defendants.*

The procedural facts at once support Petitioner's arguments with regard to preemption while demonstrating the usurpation of the due process clause in proceedings below. This case originally included three defendants - Petitioner; Ward, the pool distributor; and South Central, the slide distributor. Prior to trial, and kept secret until — and even after — counsel for Petitioner became suspicious and raised the issue on the first morning of trial, the other two defendants reached a settlement agreement with Plaintiff in the form of a high/low agreement. (Transcript of Proceedings, May 31, 2000 at 32-39, 58, Tr.Vol.II at 346). Upon suspicion of that agreement, Petitioner moved for severance prior to trial. The trial court denied that motion. (Transcript of Proceedings, May 31, 2000 at 48-49). Petitioner's multiple requests for a mistrial made during trial, (and after Petitioner's purported co-defendants (at the end of the liability phase of the trial) exited at a choreographed stage of the trial/play) were similarly denied. (Tr.Vol.I at 204-208).

During the trial, the following events transpired: no jury charges or motions in limine were filed by the other defendants (Transcript of Proceedings, May 31, 2000 at 32-33); the other defendants supported Plaintiff's motions in limine to exclude evidence of Plaintiff's alcohol use and evidence of the general atmosphere at the party (Transcript of Proceedings, May 31, 2000 at 15-20, 62-63); the pool distributor's representative, Kelly Ward, expressed his belief that the pool was defective, which the trial court noted was essentially an admission of liability (Tr.Vol.I at 195, 208); Plaintiff's "cross-examination" of Ward did not elicit any of the damaging testimony that was

uncovered against Ward during his deposition but focused solely on information Ward was allegedly given by Petitioner (Tr.Vol.I at 183-196, 204); Ward's attorney declared Petitioner's trial witness a hostile witness and aggressively attempted to force him to admit that the pool was defective, even though his client's liability was strictly derivative of Petitioner's (Tr.Vol.I 142-154); those defendants' attorneys asked no questions of Plaintiff on cross-examination (Tr.Vol.I at 49-50, 62); Plaintiff did not elicit any testimony from its expert critical of South Central and attempted to prevent Petitioner from doing so, even though that expert's testimony, even upon deposition, was the only evidence critical of South Central, a named, and purportedly actual, defendant. (Tr.Vol.I at 237-280; Tr.Vol.II at 281-283).

After Plaintiff completed the liability phase of his case, it was announced that Plaintiff had reached a final settlement agreement with the other defendants. (Tr.Vol.II at 340). Petitioner moved for a mistrial or/in the alternative, moved for the trial court to advise the jury of the high/low agreement and to be allowed to examine witnesses regarding that agreement. All these requests for relief, despite multiple requests, were denied. (Tr.Vol.II at 336, 342-359). During the court's ruling on this motion, it commented on its displeasure of Petitioner's mediation position and noted that the only evidence against Ward was his admission that he sold a defective product, and the only evidence against South Central was that elicited from Plaintiff's expert by Petitioner. (Tr.Vol.II at 352-356). A review of the record demonstrates the trial court's disdain for Petitioner and its inclination to strike at and punish Petitioner in its no-liability position.

It is clear that "any pre-trial agreement between plaintiff and a defendant must be revealed to all parties and the court prior to trial and to the jury in some appropriate degree to be decided by the trial court." Hoops v. Watermelon City Trucking, Inc., 846 F.2d 637 (10th Cir. 1988). In Hoops, the

Plaintiff and one defendant in a multi-defendant case reached a "High/Low Agreement" that was not disclosed until the dayof trial. The remaining defendant argued that it had been prejudiced due to the last minute disclosure of that agreement. The 10th Circuit disagreed, finding no prejudice in the late disclosure of the agreement. However, central to its finding of no prejudice was the fact that *the remaining defendant was allowed to cross-examine the Plaintiff regarding the agreement and could argue its effect to the jury.* Id., at 641.[9]

Petitioner was denied that opportunity in the present case. The trial court denied Petitioner's repeated requests to inform the jury of the arrangement reached by the parties pre-trial and to cross-examine witnesses regarding its effect. For example, Petitioner should have been allowed to cross-examine Kelly Ward regarding the settlement agreement and the jury should have been allowed to consider his admission that he sold a defective product - an admission of liability - in light of that agreement and to further consider how the fact that Ward's liability was limited factored into that admission. Petitioner was denied due process of law because the trial court failed to grant a mistrial or severance; failed to disclose the pre-trial settlement to the jury; and, prohibited Petitioner from cross-examining witnesses regarding their bias and prejudice due to the settlement.

Petitioner's due process rights were clearly destroyed "since a defendant must be afforded reasonable opportunity to refute grave allegations brought against [it] in a civil suit." Ellis v. Capps, 500 F.2d 225, 226 (5th Cir. 1974):

> Cordoning off a highly relevant area of inquiry such as the bias and prejudice of a complainant is repugnant to the principle of a fair trial. The

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[9] Other states have also held that a settlement agreement can be disclosed during cross-examination to show bias. Perry v. Magic Valley Regional Medical Center, 995 P.2d 816 (Idaho, 2000).

> permissible leeway for a defendant's strategems is broad indeed. ... Evidence to show bias or interest of a witness in a cause covers a wide range and the field of external circumstances from which probable bias or interest may be inferred is indefinite. The rule encompasses all facts and circumstances which, when tested by human experience, tend to show that a witness may shade his testimony for the purpose of helping to establish one side of the cause only. Facts wholly immaterial, or prejudicial to one of the parties on the main issue, may be material as affecting the credibility of a witness.

Id.

In Ellis, the defendant was a prison inmate who objected to the introduction of evidence regarding his misbehavior while in prison in his suit against the warden for unconstitutionally relegating him to solitary confinement. The 5th Circuit found that the evidence was admissible to show the defendant's "bias and prejudice against the warden as head of the institution to which the defendant was so ill-adjusted." Id. "To hold otherwise would raise serious due process problems ... ." Id.

Petitioner was denied procedural due process since it was prohibited from cross examining the other defendants regarding their bias and prejudice in favor of the Plaintiff in light of the "High/Low" agreement. Not only should the trial court have allowed the jury to know about the pre-trial agreement between the Plaintiff and the other defendants, the trial court erred in refusing Petitioner's repeated requests for mistrial due to the unfair prejudice which resulted from the existence of this secret agreement. An analysis of the record in this case clearly shows that Petitioner was denied due process.

The record discloses that the attorneys for Ward Pools and South Central took the same position as Plaintiff on every major evidentiary issue that arose during the trial, including on the admissibility of evidence of the Plaintiff's alcohol use. Kelly Ward, whose company's liability was strictly derivative of Petitioner's, admitted to selling a defective product. Ward's attorney subjected Petitioner's representative to a cross-examination designed to have that witness admit that the pool warnings were defective, although that would -- at least absent and pretrial agreement from counsel -- result in the imposition of liability on Ward Pools. No direct evidence whatsoever was elicited by the Plaintiff against South Central; Plaintiff did not elicit any criticism of South Central by his expert witness and fought Petitioner's attempts to discuss those criticisms before the jury. A review of these specific incidents and the entire record prior to the release of the other defendants shows a total absence of any real controversy between those defendants and Plaintiff and illustrates that the alignment of the parties had been altered in a way which irreparably damaged Petitioner's right to a fair trial.

Petitioner is not alone in its outrage in this regard. In his dissent in the case at bar, Judge Rapp of the Oklahoma Court of Civil Appeals was "of the opinion that the existence of the high/low agreement of the other defendants served to destroy [Petitioner's] ability to achieve a fair trial." He further opined:

> This agreement between the other defendants, known to the trial court, created and allowed the existence of sham defendants before the court and destroyed the very crucible of a trial designed to achieve the truth.

Rapp, J., dissenting.

"It is a fundamental to a full and fair [trial] required by

the due process clause that a litigant have an opportunity to be confronted with all adverse evidence and to have the right to cross-examine available witnesses." Nevels v. Hanlon, 656 F.2d 372 (8th Cir. 1981) citing Greene v. McElroy, 360 U.S. 474 (1959). "Where a party is precluded from exercising this fundamental right, the [trial] procedure is constitutionally defective, ... and cannot be excused as harmless error." Id. [cits. omitted].

In Nevels, Nevels appealed his termination by his employer which was affirmed by the Commissioner of Labor for the State of Nebraska. On appeal, the Eighth Circuit found that Nevels' right to procedural due process was denied based on the Labor Commissioner's ex parte communications with Nevels' supervisor concerning Nevels' attitude and performance. Specifically, the Eighth Circuit found that the ex parte communication denied Nevels his right to be confronted with all adverse evidence and to cross-examine witnesses.

Similarly, Petitioner was denied procedural due process since it was not allowed to address the adverse evidence concerning the "High/Low" agreement. The pre-trial agreement between the Plaintiff and the other defendants ruined the adversarial process and Petitioner's chances of a fair trial. Petitioner acknowledges the importance of according deference to a jury verdict on appeal. However, the proceedings below were befouled by collusion and secrecy to the point that the purity of the elements of an appropriate and truthful verdict were tainted. Contrary to the rulings below, depravation of due process rights can never be harmless error. Rulings championing closure over the constitutional rights to due process and a fair trial are false idols unworthy of the reverence shown them by the lower courts in the present matter.

Thus, the trial court erred in failing to grant a mistrial and a new trial should be granted to remedy this destruction of the adversarial process and denial of Petitioner's right to procedural due process.

C. *The Trial Court's Judgment in Favor of Coyle Violated Due Process as Coyle Failed to Establish an Essential Element of His Claim Against Petitioner.*

A judgment supported by no evidence on an essential element violates due process. Vachon v. New Hampshire, 414 U.S. 478 (1974). The rule that process is violated when there is no evidence to support a finding has been applied in a variety of contexts and is not limited to criminal convictions. In United States ex rel. Vajtauer v. Comm'r of Immigration, 273 U.S. 103 (1927), this Court held that the deportation of an alien on charges unsupported by any evidence is a denial of due process. In Wood v. Strickland, 420 U.S. 308 (1975), the "no evidence" rule was applied to public school disciplinary proceedings where the Court stated that an individual is denied due process when suspended in the absence of any evidence establishing a violation of a school regulation. The "no evidence" rule applies here since the record is totally devoid of any evidence that the swimming pool was defective.

The elements which must be proven in order to recover under a theory of products liability under Oklahoma law are as follows:

> First of all, plaintiff must prove that the product was the cause of the injury; the mere possibility that it might have caused the injury is not enough . . .
>
> Secondly, plaintiff must prove that the defect existed in the product, if the action is against the manufacturer, at the time that the product left the manufacturer's possession and control . . .
>
> Thirdly, plaintiff must prove that the defect made the article unreasonably dangerous to him or to his property as the term 'unreasonably dangerous' is above defined.

Kirkland v. General Motors Corporation, 1974 OK 52, ¶ 29-31, 521 P.2d. 1353

These elements, and the definition of "unreasonably dangerous," are taken from the Restatement of Torts, 2d, Section 402-A, which states that for a product to be unreasonably dangerous, it:

> must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer, with the ordinary knowledge common to the community as to its characteristics.

Bruce v. Martin-Marietta Corp., 544 F.2d 442, 447 (10th Cir. 1976). The above language has come to be known as the "consumer contemplation test" by courts in states (including Oklahoma) which follow the Restatement's formulation of this test.

Applying the "consumer contemplation test" to the facts of the instant case reveals that there is no evidence to support the judgment of the trial court that the warnings provided with the swimming pool at issue in this case were defective. In order to establish that the warnings were defective, the Plaintiff must show that the pool was thereby rendered less safe than would be expected by an ordinary consumer. The question, therefore, is what an ordinary consumer expects when he purchases or uses an above-ground swimming pool of a depth of 3 ½ feet. An ordinary consumer would expect to be able to swim and wade in a pool of such depth. However, an ordinary, objective consumer would not expect to be able to enter the pool headlong with his hands by his side without exposing himself to injury, particularly when that consumer already knew how shallow the pool was. Such an expectation is completely unreasonable based on common sense and life experience, not to mention the plaintiff's specific experience with this particular

pool on the night in question.[10]

This case falls squarely within the reasoning cited in Kirkland in which the consumer contemplation test is discussed. That the plaintiff alleges a defective warning in no way makes the product dangerous to an extent beyond that contemplated by a user with ordinary knowledge of the characteristics of a shallow pool. No ordinary consumer, as that term is defined in the Restatement, would believe that he could safely enter a pool head first when that pool contains no more than 4-5 feet of water, regardless of whatever additional products had been placed nearby by the owner. Based on the total absence of any evidence that the warnings provided with the pool were defective, the trial court's rulings and judgment have deprived Petitioner of its procedural due process rights.

Respectfully Submitted,

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[10] Of some import is the fact the slide was not a component of the pool when manufactured, given the fact that the defect, to be actionable, must have existed at the time the product left the manufacturer. As to the Plaintiff's allegations that failing to warn purchasers not to put slides with above-ground pools, Petitioner points out that in no diving case has any court found that the failure to inform purchasers not to put diving boards or other apparatus with these pools was a defect which made the product unreasonably dangerous, even though the manufacturers takes the position that one should not dive into the pools. Certainly, as indicated above, the Consumer Products Safety Commission has defined the appropriate entities to control risks associated with slides - slide manufactures.